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CARS, CREDITORS, AND THE CODE: THE DIVERSE INTERPRETATIONS OF SECTION 9-310

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INTRODUCTION

This is a brief survey of statutory interpretation. The question it seeks to answer may be stated broadly: how do courts interpret a statute (or several statutes) so as to determine priority of payment as between two creditors of a presumably insolvent debtor? It is a study of what courts have done in the past, on the theory that this may offer suggestions to courts faced with a similar problem in the future. It is limited to one particular priority conflict—that between a lender with a perfected security interest in an automobile and a repairman with a lien for work he has done on that automobile.

The usual story is this. The prospective purchaser of an automobile borrows money to buy it and the lender (often the seller) has him sign a security agreement of some kind, the agreement requiring repayment in installments. The lender perfects the security interest created by the agreement. Later the automobile breaks down, and the purchaser takes it to a garage to have it repaired. The repairman at the garage may or may not have actual knowledge of the perfected security interest. After the car is repaired, the debtor both fails to pay the garageman and fails to make his periodic payment on the loan. So there are two creditors looking to the car as security for payment of what is owed them. By statute or under the common law the garageman has a lien for his labor and materials. The legal problem is whether this lien has priority over the previously perfected agreement (or consensual lien, if you will).

Perhaps some suppositions should be added to the fact situation to explain how the creditors get involved in their dispute. The suppositions are these. First, the debtor is apparently insolvent. This does not necessarily have to be so. It well may be that the mechanic prefers to try to get the lender to pay by refusing to give up possession of the car. This is simpler, quicker, and less expensive than suing the purchaser. (The word “purchaser” is used rather than “owner” because some courts may say he is not the owner for purposes of solving the priority problem.) Second, the car is probably a used car. Presumably if it is a

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fairly new one, the purchaser will take it back to the seller and have it fixed under the warranty. Again, this is not necessarily so. It may be that the warranty does not cover the trouble that has arisen. But, judging from the facts in the cases examined below, the car is a used one most of the time. Third, and this probably follows from the second supposition, if the lender should repossess the car and sell it there is never enough, after the lender takes his share, to pay the mechanic in full—if indeed there is anything for him at all. The final supposition is that the labor charge is much more than the value of materials added. For example, suppose the garageman sells tires. If four new tires are added, each costing \$25, the charge for labor required to dismount the old and mount the new ones is probably about \$5. Thus if the car is to be repossessed, and the tires can be classified as accessions under Uniform Commercial Code¹ Section 9-314,² the repairman can replace the new tires with the old ones and be out only \$10 rather than \$100. On the other hand, if the parts are worth only \$90 and the labor is worth \$210, the repairman would be foolish to expend another \$210 worth of labor replacing the old parts just to get his new ones back.

1. Hereinafter cited as U.C.C.

2. If all sellers giving credit are as up-to-date as most of those with whom this writer has had experience, they will have a security interest in the tires. The writer recently had the oil changed in his automobile. On the "standard form" authorizing the work to be done were words to the effect that the seller kept a security interest in the oil until paid for! (And on the sheet extending credit was of course information to comply with the "Truth-in-Lending Act".) The pertinent subsections applicable here are:

U.C.C. § 9-314.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to Section 9-315(1).

* * *

[Subsections (2) and (3) will rarely, if ever, apply. In the case of automobile tires the application of § 9-315(1) seems impossible. So for the sake of brevity, they are omitted here.]

* * *

(4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of Part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation. Removing tires will hardly be an operation bringing about physical injury to the car. And if the debtor does not pay a cent, but leaves the repairman to his lien (as happened in the cases below), the repairman will hardly bother with or be bothered by Part 5 of Article 9 of the Code.

There have been arguments made on behalf of each of the competing parties as to which should prevail over the other.³ There is no point here in going over them again. The assumption made here is that one side has convinced the state legislature of the merits of its argument and statutes have been passed which are meant to reflect the legislative intent. The catch is that legislators are often surprised to find out what they meant. This is no less true when the court of their state uses a decision of the court of another state to help support its decision. The court in State A sees that the court in State B interpreted a statute of State B which is worded the same as a statute of State A. The opinion of the court in State B interpreting the statute is then used to bolster the opinion of the court in State A, to help show that its similar interpretation is correct. The legislature of State A may not have had the same intent as that in State B. Still opinions are used to buttress opinions. That this takes place is the main justification for this article. If all courts started from "bare bones" the compilation of cases here would be no more than a repetition of the compilations that may be found in the various reporting services.

The legislators will not, however, always be surprised. Courts have refused to follow those interpretations which they believe not to be applicable to the statutes in their states. The cases here will show that. And, though this writer disagrees with some of the interpretations below, criticism of the decisions is not the primary purpose of this article. Rather it attempts to make an examination of how courts have taken one statute, which referred to other statutes, and tried to reconcile the words of all the statutes that the courts considered pertinent to the problem. At the conclusion of the article there will be a short discussion of whether or not either party has been bettered in his position because of the enactment of the U.C.C. in his state. And, finally, assumption is made that in future decisions other courts will examine the interpretations of the courts mentioned below; so some space at the end will be devoted to possible uses courts in the future can make of these cases.

Priority as between the repairman or mechanic and the lender is

³ Excellent coverage of the subject matter of statutory liens and their priority is found in 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY*, Chapter 33 (1965). See also for arguments as to proper order of priority, Note, *Security Interests in Motor Vehicles Under the UCC: A New Chassis for Certificate of Title Legislation*, 70 YALE L.J. 995, 1013-1014 (1961); Note, *Nonconsensual Liens Under Article 9*, 76 YALE L.J. 1649, 1649-63 (1967).

governed by section 9-310 of the Uniform Commercial Code. The Code has been adopted by all states except Louisiana.⁴ The section provides:⁵

Section 9-310 Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

From this alone it would seem that one need go only to the lien statute (if there is one) and see whether or not it provides that the mechanic shall not have priority. While this may be true as to most chattels, however, the determination of priority is not so simple when dealing with automobiles. For, although Article 9 deals with security interests in personal property, that one item of personal property in which most Americans have invested most money—the automobile—is in most states given special treatment.

The special treatment results from subsection (3) of section 9-302 of the Uniform Commercial Code. It provides:

Section 9-302. When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply.

* * *

(3) The filing provisions of this Article do not apply to a security interest in property subject to a statute

* * *

Alternative A—

(b) of this state which provides for central filing of, or which requires

4. The District of Columbia has adopted it as well.

5. There are two variations of this *so far*, each adopted by one state only. One is Georgia's version, a monstrosity that need not be quoted since it is not one of the states involved here. The other is Colorado's, which provides:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services does not take priority over a perfected security interest unless a statute expressly provides otherwise.

COLO. REV. STAT. ANN. § 155-9-310 (1963). Notice the two changes. The words "takes priority" were changed to "does not take priority", and after the word "unless" the words "the lien is statutory and" were deleted. The lack of "a provision otherwise" thus helps the lender, not the mechanic; and a common law lien will not always take priority. A statute can provide that a security interest (or any other encumbrance) will take priority over a common law lien.

indication on a certificate of title of, such security interests in such property.

Alternative B—

(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state of a notation of such a security interest can be indicated by a public official on a certificate or duplicate thereof.

Some states with title laws provide for perfection of liens by notation on the certificate. If a state does not have a certificate of title law, the above Code section seems to indicate that the problem of statutory interpretation is somewhat simplified. Kentucky, a state where one of the cases to be examined was decided, does not have a certificate of title law. Furthermore, even if the state should have such a law but does not require or permit indication on the certificate of title to perfect the security interest, the problem of interpretation should remain one of examining provisions of the U.C.C. and the lien statutes only. However, where a state has adopted a certificate of title law which either requires (Alternative A) or allows (Alternative B) noting of the security interest on the certificate, some courts have decided it to be necessary to go beyond the lien statutes to solve the problem. They have brought in the title laws. Others, however, do not go so far.

The question might well be asked why other statutes should even enter the picture. From the standpoint of research, the attorney's job would certainly be easier if he needed to examine only the lien statute to see whether or not it subordinated the mechanic to anyone else. And the comment to section 9-310 seems to encourage him to stop there. Comment 2 says that, if the lien statute contains no priority provision, the lien should take priority even though a court decision has subordinated the lien to the security interest. However, not only do some of the title laws provide for a notation of security interests on the certificate of title, they further provide those as to whom these perfected security interests are "notice".

As noted above, section 9-302 excuses a creditor from filing under the U.C.C. provisions where he must or may perfect his interest by a notation on the certificate. The courts then have to make a choice if the adoption of the title law is prior to the adoption of the Code. They can say that, since the Code was adopted later, section 9-310 repeals by implication the title law as it affects the priority of the lien of the repairman. Or they can say that since the method of perfection is

excepted from the Code, the priority granted by section 9-310 is also excepted, but only as to automobile repairmen.

The latter reasoning would be something like this: a lender perfects to establish his priority (or to limit the interest the borrower can convey if he sells the chattel to a bona fide purchaser). Once he has perfected in the way that is required or is permitted on a certificate of title, he should be able to rest easy knowing he has priority over other liens. So the title law should be examined.

There is an answer to this latter argument, however. He is allowed to perfect his interest on the certificate of title because the Code permits him to do so. If the Code is the ultimate source of his right to so perfect, it should also be the ultimate source of his right to priority or lack of it. And "the statute" should mean only one statute should be examined. But this argument does not entirely settle the matter. For suppose a legislature adopted a lien statute and made no mention of priority. Then suppose that elsewhere in the statutes was a section which set out priorities of all liens. Would not this latter statute govern the lien statute, and would it not be included in the meaning of "the statute" which "provided otherwise" under section 9-310? If this other statute could fit the meaning, then it would seem that the title statute could equally apply.⁶ As we shall see below, some of the courts have in fact based their decision on what they considered to be the order of priority granted by the title act.

One final statement should be made before turning to the cases themselves. Attorneys advising lending institutions might note that some of the cases below were determined by the type of instrument used.

THE DECISIONS

Cases decided under the Code first appeared in 1964 in Ohio and Kentucky. In the Ohio case, *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*,⁷ the court of appeals decided that section 9-310 would not help the garageman to win. The loan company had recorded its chattel mortgage on the certificate of title and this was given priority. The court concluded that the title law⁸ gave priority to a security interest

6. For further argument against going no further than the lien statute, see Note, *Nonconsensual Liens Under Article 9*, 76 YALE L.J. 1649, 1663 (1967).

7. 4 Ohio App. 2d 4, 33 Ohio Op. 2d 6, 211 N.E.2d 57 (1964).

8. OHIO REV. CODE § 4505.13 (Page 1962). The first paragraph provides as follows:

Record of security interests. Sections 1309.01 to 1309.50 inclusive, of the Revised Code, do not permit or require the deposit, filing, or other record of a security interest covering a

properly noted on the certificate of title. So the first case went beyond the lien statute to determine priority.

The court introduced what to this writer was some needless confusion. It interpreted erroneously the words of section 9-310, "a lien . . . given by statute or rule of law . . . takes priority . . . unless the lien is statutory and the statute expressly provides otherwise." To this writer the words mean that, under the section, two kinds of liens are to be considered, statutory ("given by statute") and common law ("given by . . . rule of law"). If the lien is common law it takes priority and that is the end of the matter. If the lien is statutory, it still takes priority unless the statute expressly provides that it does not. If a common law lien has been codified by the state legislature, this should fulfill the requirement of "given by statute" as well as if it had been created by statute. The Ohio court, however, read section 9-310 in another way. (Or perhaps it thought "given" meant only "created".) It thought the statute meant that "a common law lien" takes priority unless it "is statutory and the statute denies priority." The court said that this did not make sense. With this statement this writer agrees.

Having interpreted into the statute a confused meaning, it decided that the correct meaning must be that the word "lien" in the part "unless the lien is statutory" referred to the chattel mortgage (or in modern terms the "security interest"). This interpretation (that it meant a consensual lien allowed by statute) would leave section 9-310 in a mess—as has been pointed out elsewhere.⁹ For it would mean that section 9-310 would send

motor vehicle. Any security agreement covering a security interest in a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's or importer's certificate and followed by actual and continued possession of such certificate by the holder of said instrument, or, in the case of a certificate of title, if a notation of such instrument has been made by the clerk of the court of common pleas on the face of such certificate, shall be valid as against the creditors of the debtor, whether armed with process or not, and against subsequent purchasers, secured parties and other lienholders or claimants. All liens, mortgages, and encumbrances noted upon a certificate of title shall take priority according to the order of time in which the same are noted thereon by the clerk. Exposure for sale of any motor vehicle by the owner thereof, with the knowledge or with the knowledge and consent of the holder of any lien, mortgage, or encumbrance thereon, shall not render such lien, mortgage or encumbrance ineffective as against the creditors of such owner, or against holders of subsequent liens, mortgages, or encumbrances upon such motor vehicle. (emphasis added)

U C C § 9-302 (on recording) was OHIO REV. CODE § 1309.21 (Page 1962) and § 9-310 was OHIO REV CODE § 1309.29 (Page 1962).

9. Criticism of this interpretation of the court is also found in Note, *Nonconsensual Liens Under Article 9*, 76 YALE L.J. 1649, 1662, n. 64 (1967).

you to a "statute" which would turn out to be article 9 (and thus to section 9-310) most of the time.

On appeal, the Ohio Supreme Court affirmed the decision in *Commonwealth Loan Co. v. Berry*.¹⁰ The wording of section 9-310 did not confuse the higher court. Nevertheless, the reason given for affirming seems astonishing, namely that the repairman's lien was subordinate because it was a common law lien. It would seem that this would be the one case in which the lien would always have priority. But the court's reasoning was more involved than the simple statement above would indicate. First, the common law artisan's lien was adopted by statute,¹¹ but the automobile repairman's lien was excluded from this statute (thus leaving his lien a common law lien). Second, Ohio was a title state, and the automobile title law specifically provided that security interests in automobiles were to be outside the scope of the U.C.C.¹² and were to be perfected by entry upon the certificate of title. Third, the U.C.C. specifically provided that perfection of security interests in automobiles was to be governed by the title law.¹³

There was one important point which did not appear in either the opinion of the intermediate court or that of the supreme court but which may have influenced the courts. Both the Uniform Commercial Code and the section of the title law providing for perfection (or rather the amendment of that section) were part of the same act of the legislature.¹⁴ Furthermore, although it was not a part of this "package deal", the statute codifying the common law liens (and excepting the lien of the automobile repairman) was passed during the same session of the legislature.¹⁵ The U.C.C. and the section of the title law were passed as a senate bill on April 27, 1961, and approved by the governor on May 18. The lien statute was passed as a house of representatives bill on May 8

10. 2 Ohio St. 2d 169, 31 Ohio Op. 2d 321, 207 N.E.2d 545 (1965).

11. OHIO REV. CODE § 1333.41 (Page Supp. 1969). The first paragraph was as follows:
Every bailee for hire performing work or furnishing material on personal property other than motor vehicles as defined in section 4501.01 of the Revised Code at the request of the owner shall have a lien upon such property for the charge for such work and materials furnished by such bailee for hire and cost of notifications provided for in this section, and may sell the same . . . (emphasis added)

12. See note 8 *supra*.

13. Ohio adopted Alternative A of U.C.C. § 9-302(3)(b) shown in the text above. OHIO REV. CODE § 1309.21(c)(2) (Page Supp. 1969).

14. Senate Bill 5, 1961. 129 v. S5.

15. House Bill 42, 1961. 129 v. H42.

and approved May 16. The lien statute was made effective August 15, 1961, although the U.C.C. was not to go into effect until July 1, 1962.¹⁶

This author has no idea what went through the minds of the lobbyists, the legislators, or the members of the court. But the court had to make some guesses. For reasons best known to the legislature, the repairman's lien was "left" a common law lien. Assume there were several reasons, one of which may or may not have had to do with its priority in relation to a perfected security interest. "Leaving" it a common law lien gave the state no "statute" to provide that the repairman's lien was to be subordinate to the security interest. The legislature could, of course, have varied section 9-310 to provide that automobile repairmen were to be subordinated (and Ohio was not hesitant about varying sections of the "uniform" Code).¹⁷ But it had not done so. Therefore, the court did not have this to fall back on. But the legislators had put a great deal of energy into passing the bills and the court may have been aware of this. If so, they could have concluded that this was because the legislators meant to subordinate the repairman's lien. It is submitted, then, that the court reached the conclusion it did, not just because the three acts they tried to reconcile were on the books, but because they were passed by the same group of men (no doubt "advised" by the same pressure groups) in the same session of the legislature.

This writer feels that the court could have gone the other way. In interpreting the title section, it could have concluded that the legislature did not mean "other lienholders" in the title law¹⁸ to include the automobile repairman, because the statute "leaving" his lien a common law one was passed after the legislature had passed section 9-310, which gave common law liens priority. "Other lienholders" would then have meant creditors with consensual, attachment, judgment, or execution liens. This, it is submitted, would have been the better conclusion.¹⁹ The

16 The difference in dates of effectiveness may account for the court's deciding the legislature meant to do more than "leave" the repairman's lien a common law lien. This would leave ten and one-half months for "pre-Code" cases to arise. Under these cases presumably the courts would follow prior law. Then, after the Code, courts could rely on Comment 2 to § 9-310 to the effect that the section was not meant to repeal prior statutes establishing priority. But a common effective date for both statutes would seem to be more indicative of an intent that they were "keyed into" each other.

17. See Murphey, *Uniformity, Forged Indorsements, and Comprehension—Some Observations on the Uniform Commercial Code for Mississippi*, 35 Miss. L.J. 356, 357-60 (1964).

18. See note 8 *supra*.

19 The garageman is only looking for payment for value restored (after the car decreased in value—as shown by the need for repairs). He is less likely to have actual notice. But the other four

legislature could have better expressed what it meant. But since the court had to take the acts as they found them, this writer feels that the court's interpretation can be justified even though he does not agree with it.

In Kentucky, *Corbin Deposit Bank v. King*²⁰ involved a Uniform Commercial Code security agreement, perfected by proper filing. The lender was the bank and the repairman was King. Prior to the adoption of the Code, the holder of a properly recorded chattel mortgage was given priority over the repairman.²¹ Here, however, section 9-310²² changed things. The lien statute²³ did not contain any provision subordinating the lien to an earlier security interest. Thus, the repairman's lien was held to have priority.

The problem of statutory interpretation here, then, would seem to have been an easier one than that in Ohio. But there was one further problem that the court dealt with. Although the section granting the lien did not subordinate it, another section²⁴ did subordinate it to "a

mentioned above, being in a position to choose the property upon which to assert their liens, will—if careful—first check to see that it is unencumbered.

20. 384 S.W.2d 302 (Ky. Ct. App. 1964). For a casenote on this see 14 CATH. U.L. REV. 285 (1965).

21. *Lincoln Bank & Trust Co. v. Netter*, 253 S.W.2d 260 (Ky. Ct. App. 1952).

22. KY. REV. STAT. § 355.9-310 (1969).

23. KY. REV. STAT. § 376.270 (1969) provides:

Lien on motor vehicle for repairs, storage or accessories; filing of statement with county clerk. Any person engaged in the business of selling, repairing or furnishing accessories or supplies for motor vehicles shall have a lien on the motor vehicle for the reasonable or agreed charges for repairs, work done or accessories or supplies furnished for the vehicle, and for storing or keeping the vehicle, and may detain any motor vehicle in his possession on which work has been done by him until the reasonable or agreed charge therefor has been paid. The lien shall not be lost by the removal of the motor vehicle from the garage or premises of the person performing labor, repairing or furnishing accessories or supplies therefor, if the lien shall be asserted within six months by filing in the office of the county clerk a statement showing the amount and cost of materials furnished or labor performed on the vehicle. The statement shall be filed in the same manner as provided in the case of a mechanic's lien, after the removal of the vehicle, unless the owner of the vehicle consents to an additional extension of time, in which event the lien shall extend for the length of time the parties agree upon. The agreement shall be reduced to writing and signed by the parties thereto.

24. KY. REV. STAT. § 376.450 (1969) provides:

Lien inferior to mortgage or sale unless statement filed. The lien shall not take precedence over a mortgage or bona fide sale and delivery for value without notice, unless the person claiming the prior lien shall, before the recording of the mortgage, or before sale and delivery, file in the office of the Clerk of the County Court a statement showing that he has furnished or expects to furnish labor, or materials, or parts, or supplies, and the amount in full thereof. The lien shall not, as against the holder of a mortgage, or a purchaser for value, exceed the amount of the lien claimed, as set forth in the statement. The statement shall in all other respects be in the form provided in KRS 376.445.

mortgage or bona fide sale and delivery for value without notice" unless the lienholder filed notice of his lien before a mortgage was filed or the car sold and delivered. The court said that section 9-310 dealt with "security interests" not "mortgages". It pointed out that mortgages and security interests are not the same. Thus the section giving priority to the mortgage did not apply. The reader may wish to compare this reasoning with that of the Arkansas court, to be discussed below in equating a "lien retaining title" with a security interest. The Kentucky court also expressed doubt that the priority statute applied to automobiles. The court's distinguishing between instruments raises an interesting question. If the court should later decide that the statute does apply to automobiles, can a lender improve his position by labeling his security instrument a "Mortgage-Security Agreement" or "Mortgage and Security Agreement"?

The following year in *Westlake Finance Co. v. Spearmon*,²⁵ the Appellate Court of Illinois held that the repairman to whom Spearmon had taken his automobile, had a lien with priority over Westlake. The instrument Westlake used was a Retail Installment Sales Contract (a conditional sale contract). And Spearmon's certificate of title showed a lien in favor of Westlake when the car was taken to be repaired. The repairman's lien was statutory;²⁶ but although the statute did not provide for subordination, a later statute did subordinate the lien to a previously recorded chattel mortgage.²⁷ No mention was made of conditional sale

25. 64 Ill. App. 2d 342, 213 N.E.2d 80 (1965).

26. ILL. ANN. STAT. ch. 82, § 40 (Smith-Hurd 1963) provides:

Lien on chattels for labor—Commencement—Amount. Every person, firm or corporation who has expended labor, skill or materials upon any chattel, or has furnished storage for said chattel, at the request of its owner, reputed owner, or authorized agent of the owner, or lawful possessor thereof, shall have a lien upon such chattel beginning on the date of the commencement of such expenditure of labor, skill and materials or of such storage for the contract price for all such expenditure of labor, skill or materials, or for all such storage, or in the absence of such contract price, for the reasonable worth of such expenditure of labor, skill and materials, or of such storage, for a period of one year from and after the completion of such expenditure of labor, skill or materials, or of such storage, notwithstanding the fact that the possession of such chattel has been surrendered to the owner, or lawful possessor thereof.

27. ILL. ANN. STAT. ch. 82, § 43 (Smith-Hurd 1963) provides:

The lien created by this Act shall be subject to the lien of any bona fide chattel mortgage upon the same chattel recorded prior to the commencement of any lien herein created, but the lien herein created shall be in addition to, and shall not exclude, any lien now existing at common law, and any lien existing by virtue of 'An Act concerning liens for labor, service, skill, or materials expended upon chattels,' enacted by the Sixty-second General Assembly.

contracts, however. The Illinois court thus was not faced with the problem of the Kentucky court as to whether or not "chattel mortgages" or "conditional sale contracts" should be interpreted to mean "security interests" under the Uniform Commercial Code. And since neither the lien statute nor any other statute subordinated his lien to a conditional sale contract, the repairman won.

In 1965, the lien priority statute was amended²⁸ to subordinate the repairman's lien to a perfected "security interest as defined in the Uniform Commercial Code." In *Pennington v. Alexander*,²⁹ Alexander borrowed money from M.L.C. Corporation Inc. to buy a diesel tractor. The lien was perfected by filing a financing statement with the Secretary of State of the state and by noting it on the certificate of title to the vehicle. Subsequently the vehicle was repaired and the repairman sought to assert his statutory lien. It was held that this was subordinate to the security interest. The court was ambiguous as to whether or not the repairman might have won if he had alleged that he had kept possession of the vehicle and was asserting a common law lien for repairs. He tried to assert on appeal that he had a common law lien, but the court would not consider the issue since it was not asserted in his complaint.³⁰ The problem of interpretation here, then, was a simple one. But the future course of interpretation has been left in doubt—if the repairman keeps possession of the car.

In 1966, the repairman lost in Alaska, in *Decker v. Aurora Motors, Inc.*³¹ As in Ohio, the Alaska court went outside the lien statute to decide the priority question. Aurora, the seller, used an instrument called a "Retail Installment Contract". When Decker was not paid for his work, he retained possession of the car. An earlier case³² (decided while the state was a territory) had interpreted the lien statute³³ so as to let the

28. The 1965 act substituted "security interest as defined in the Uniform Commercial Code" for "chattel mortgage" and "filed July 24, 1941" for "enacted by the Sixty-second General Assembly." Otherwise § 43 provides the same as in footnote 27, *supra*. ILL. ANN. STAT. ch. 82, § 43 (Smith-Hurd 1966).

29. 103 Ill. App.2d 145, 242 N.E.2d 788 (1968).

30. *Pennington v. Alexander* 103 Ill. App. 2d 145, 148, 242 N.E.2d 788, 789 (1968). Why bring up this point if it would not have altered the decision? The court could simply have said it makes no difference since the lien statute would give the other party priority in either event. Compare this disposition of the argument with the later statement on the priority of the security interest: "It is clear that Section 43 grants a priority to the lien of any security interest previously recorded." 103 Ill. App.2d 145, 149, 242 N.E.2d 788, 790 (1968).

31. 409 P.2d 603 (Alaska, 1966).

32. *Blackard v. City Nat'l Bank*, 142 F. Supp. 753 (D.C. Alas., 1956).

33. ALASKA COMP. LAWS ANN. § 26-3-1 (1949) in part provided:

Any person who shall make, alter, repair or bestow labor on any particular article of

repairman prevail. It had based its reasoning on one of the subsections³⁴ of the Motor Vehicle Act. In 1957, however, though the lien statute remained the same, the section of the Motor Vehicle Act was amended. The new subsection provided:³⁵

The filing and the issuance of a new certificate of title is constructive notice of all liens and encumbrances against the vehicle described in the certificate to creditors of the owner, or to subsequent purchasers and encumbrancers. However, *an encumbrance or lien on a vehicle for work, labor, material, transportation, storage, or similar activity, whether or not dependent on possession for its validity, is subordinate only to mortgages, conditional sales contracts, or similar encumbrances or liens properly filed on or before the time that the vehicle is subject to, or comes into possession of, the encumbrance or lien claimant.* (emphasis added)

In light of this, the court in the *Decker* case held that the seller (lender) had priority over the repairman. Alaska had by then adopted the Uniform Commercial Code.³⁶ But this statute “expressly provided otherwise” and, though it was not the lien statute, the court considered it controlling. Since the wording was so obvious, there was no problem of interpretation as to priority once the court decided that the subsection of the title act was included in the meaning of “the statute.”

personal property at the request of the owner or lawful possessor thereof, shall have a lien on such property so made, altered or repaired, or upon which labor has been bestowed, for his just and reasonable charges for the labor he has performed and material he has furnished and such person may hold and retain possession of the same until such just and reasonable charges shall be paid. . . .

This section, reworded, now appears as ALASKA STAT. § 34.35.175 (1962). He could formerly surrender possession and keep his lien by filing a notice. ALASKA COMP. LAWS ANN. §§ 26-3-2 to -3 (1949) He still may. ALASKA STAT. §§ 34.35.180, .185 (1962).

34. Ch. 124, § 7(1) [1951] Alas. Acts 338 provided:

No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, shall be valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirement [sic] of this Section have been complied with. (emphasis added)

And the act continued so that § 7(4) provided:

Such filing and the issuance of a new certificate of title as herein provided shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, or to subsequent purchasers and encumbrancers. (emphasis added)

The present section, ALASKA STAT. § 28.10.470 (1962), is similar to § 7(1) except that “shall be valid” is now “is valid”, “requirement” is now “requirements”, and “have been complied with” is now “are complied with.”

35 ALASKA STAT. § 28.10.510 (1962). This amended subsection (4) of § 7 in footnote 34, *supra*

36. ALASKA STAT. §§ 45.05.002-.794 (1962).

In 1967, the repairman won in Oklahoma in *Commerce Acceptance of Oklahoma City, Inc. v. Press*.³⁷ In this case the instrument was a chattel mortgage. And the lien which the repairman, Press, asserted was a statutory, not a common law, lien. The statute³⁸ did not expressly provide that the lien was subordinated to the lender's recorded chattel mortgage (perfected security interest), although another statute³⁹ giving him a lien did subordinate it. The first statute required possession for the lien to be effective, which the repairman retained. The Uniform Commercial Code had been adopted, effective in 1963.⁴⁰ The case discussed the lien statutes only; since the repairman complied with the one he claimed, and the statute did not subordinate him, he won. The problem of interpretation was rather simple. The Motor Vehicle Title Act⁴¹ contained no provision that notation of encumbrances on certificates of title would constitute "notice" to future lienors. So the court had no reason to go beyond the lien statutes.

Still later that same year, Tennessee reached the same result in *Manufacturer Acceptance Corp. v. Gibson*.⁴² Gibson, the owner, purchased a used car; and the plaintiff was the holder of the note Gibson had signed as well as the assignee of the conditional sale agreement the seller had used to secure it. Proper notation was made on the certificate of title. Furthermore, the repairman, with the seemingly appropriate name Alert Automatic Transmission Service, Inc., had *actual* notice of the lien at the time Gibson delivered his automobile to be repaired. When Gibson defaulted in payments to M.A.C., the company brought an action in replevin to get the car from

37. 428 P.2d 213 (Okla. 1967).

38. OKLA. STAT. ANN. tit. 42, § 91 (Supp. 1969) provides in part:

Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by furnishing material, labor or skill for the protection, improvement, safekeeping, towing, storage or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service.

39. OKLA. STAT. ANN. tit. 42, § 131 (1954) provides:

Blacksmiths, wheelwrights and horseshoers who perform work and labor for any person, if unpaid for same, shall have an absolute lien, *subject to all prior liens*, on the product of their labor and upon all wagons, carriages, automobiles, implements and other articles repaired, or horses, or other animals shod by them, for all sums of money due for such work or labor and for any material furnished by them and used in such product, repairs or shoeing. (emphasis added).

40. OKLA. STAT. ANN. tit. 12A, § 10-101 (1963).

41. OKLA. STAT. ANN. tit. 47, §§ 23-23.13 (1962).

42. 220 Tenn. 654, 422 S.W.2d 435 (1967).

Alert. Alert won the case, and the Tennessee Supreme Court affirmed this.

The Tennessee court on the surface went in exactly the opposite direction from the two Ohio decisions. First, unlike the Ohio appellate court in *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*,⁴³ the Tennessee court had no trouble in deciding that U.C.C. section 9-310 meant for the repairman to have priority when (1) the lien was a common law one or (2) when it was based upon a statute and the statute did not expressly make it subordinate to a prior perfected security interest. Second, the mechanic, as in Ohio, was basing his claim on a common law lien.⁴⁴ Third, as was true in Ohio, Tennessee was a title state;⁴⁵ and a case⁴⁶ prior to the state's enactment of the Uniform Commercial Code had subordinated the mechanic to a lender who properly noted his encumbrance on the certificate of title. The Tennessee court, however, held that the enactment of the Code had the effect of changing the rule and giving the repairman priority. It noted the Ohio Supreme Court case (the *Berry* case),⁴⁷ but stated that it disagreed with it. It said that *Berry* had interpolated "a condition upon the possessory lien" that was not in section 9-310. It is submitted that purely as a matter of statutory interpretation, the Tennessee decision better expresses the intent of the drafters of the Code than the Ohio decision does, even in giving priority to a repairman with actual knowledge of the prior perfected security interest.

In 1968, the Arkansas supreme court, in *Bond v. Dudley*,⁴⁸ decided that by using the proper instrument the lender will prevail over the repairman. That will be whenever the lender is a seller who uses a security agreement which "retains title" in the lender. Any assignee of the agreement will no doubt get the same rights. Because of the holding, one can expect that in all cases of purchase money lending in the future, the lender will see to it that the borrower signs an instrument which "retains title" in the lender. It will, of course, be possible for the repairman to have priority if the borrower owns the automobile prior to the loan and puts it up for security. Probably if

43. See note 7 *supra*.

44. At first the lienor could win in Tennessee so long as he did not have *actual* notice of the lien. *Robinson Bros. Motor Co. v. Knight*, 154 Tenn. 631, 288 S.W. 725 (1926).

45. The law was adopted in 1951. TENN. CODE ANN. §§ 59-101-59-608 (1955).

46. *City Finance Co. v. Perry*, 195 Tenn. 81, 257 S.W.2d 1 (1953). The crucial section was TENN. CODE ANN. § 59-327 (1955).

47. See note 10 *supra*.

48. 244 Ark. 568, 426 S.W.2d 780 (1968).

the lender attempts to work out a transaction which will first give him "title" and then let him "retain" it, the court will hold that this is not within the intent of the statute.⁴⁹ If so the repairman should win.

Although Arkansas law provides for noting liens on certificates of title,⁵⁰ the case was decided on the lien statute⁵¹ alone. It "expressly provided otherwise." An examination of the lien statute, however, will show that there was a problem of interpretation involved to reach this conclusion. Arkansas had taken the common law possessory lien into its statutes.⁵² And the law still appears on the books. The Arkansas Legislature later created the statutory lien,⁵³ however, and subsequently the supreme court⁵⁴ held that this lien superseded the common law

49. In *Lee v. Erickson*, 226 Ark. 442, 291 S.W.2d 238 (1956), a case before the U.C.C. was adopted, the Arkansas court readily saw through a similar sham transaction, and the attempt by the lender failed.

50. ARK. STAT. ANN. § 75-160 (Supp. 1969).

51. ARK. STAT. ANN. § 51-404 (1947) provided for the lien as follows:

All blacksmiths, horseshoers, wheelwrights and automobile repairmen, firms and corporations, who perform or have performed work or labor for any person, or furnish any materials for the repair of any vehicle, including tires and all other motor propelling conveyances, if unpaid for same, shall have an absolute lien upon the product of their labor and upon all such wagons, carriages, automobiles, trucks, tractors, and all other motor propelling conveyances, implements and other articles repaired, all horses or other animals shod by them, for the sums of money due for such work and labor, and for materials furnished by them, and used in such product, shoeing and repairing, including the furnishing of tires and all other accessories for automobiles, trucks, tractors and all other motor propelling conveyances.

It has since been again amended to allow a lien on aircraft. ARK. STAT. ANN. § 51-404 (Supp. 1969). ARK. STAT. ANN. § 51-412 (1947) in part provides for priority as follows:

The lien herein provided for shall take precedence over and be superior to any mortgage or other obligation attaching against said property in all cases where the holder of such mortgage or other obligation shall permit such property to remain in the possession and be used by the person owing and bound for the amount thereof; provided, that the lien herein provided for shall be subject to the lien of a vendor of automobiles, trucks, tractors and all other motor propelling conveyances *retaining title therein*, for any claim for balance of purchase money due thereon; . . . (emphasis added)

Both "sections" were part of the same "statute" (Act 140, [1919] Ark. Acts, p. 123).

52. ARK. STAT. ANN. § 51-401 (1947) provides:

All mechanics and artisans who are in possession of articles of personal property, and hold the same by virtue of a lien thereon for labor and material, shall have a right to sell the same for the satisfaction of the debt for which the property is held; provided, he shall give a bond in the sum to be fixed by a justice of the peace or circuit judge before he shall proceed to sell, by proceeding in accordance with the requirements of this act [§§ 51-401 -51-403].

53. See note 50 *supra*.

54. *Shelton v. Little Rock Auto Co.*, 103 Ark. 142, 146 S.W. 129 (1912). This held that the sections (now ARK. STAT. ANN. §§ 51-401 - 51-403 [1947]) were not applicable to wheelwrights, and held that one who conducts a garage in which he repairs automobiles is a wheelwright within the meaning of the statutory lien statute (now ARK. STAT. ANN. § 51-404).

possessory lien. Originally the act⁵⁵ creating the statutory lien did not give the lender priority. And in 1917 a repairman won a case⁵⁶ against a lender. Two years later the statute was amended to read (in part):⁵⁷

The lien herein provided for shall take precedence over and be superior to any mortgage or other obligation attaching against said property in all cases where the holder of the mortgage or other obligation shall permit such property to remain in the possession and be used by the person owing and bound for the amount thereof; provided that the lien herein provided for shall be subject to the lien of a vendor of automobiles, trucks, tractors and all other motor propelling conveyances *retaining title therein*, for any claim for balance of purchase money due therein; . . . (emphasis added)

The only problem of interpretation is found in the idea that there may be an instrument which, after the passage of the Uniform Commercial Code, "retains title."⁵⁸ The statute quoted above *could* be interpreted to mean that so long as the instrument merely provides that it "retains title" that will be sufficient. If that is the meaning then the instrument used in this case was good enough. For the purchaser signed a "Title Retaining Note". But surely the legislature meant that the vendor could use any instrument which "retained title" in him as a matter of law. In short, an instrument entitled "Conditional Sales Contract" should have been sufficient. If this is so what effect did the passage of the Uniform Commercial Code in Arkansas⁵⁹ have on the statute?

In the first place, even before the Code, a vendor who used a "title

55. Blacksmiths and wheelwrights who perform work or labor for any person, if unpaid for the same, shall have an absolute lien on the product of their labor and upon all wagons, carriages, farm implements and other articles repaired by them, for such work or labor and for all materials furnished by them and used in such product or repairs. Act 147, § 1 [1903] ARK ACTS, p. 260.

56. Weber Implement & Automobile Co. v. Pearson, 132 Ark. 101, 200 S.W. 273 (1917).

57. It so provided up until after the facts of *Bond v. Dudley* had occurred (see note 50, *supra*) and perhaps can be said to add another meaning to "the statute". Having been an amendment it was not part of "the statute" as it originally appeared. It was a statute passed sixteen years later. And of course it is a different section (separated by seven others) from the section granting lien. However, it does not seem to put much stress on the process of interpretation to say U.C.C. § 9-310 means "the statute as amended" or "the present version of the statute" even though it appears several sections later in the compilation of statutes.

58. Perhaps a better expression would be "causes title to remain in the vendor" since the instrument does not itself keep title. But this expression is used to conform to the words of the priority section of the statutes.

59. It became effective in Arkansas midnight December 31, 1961. Act 185, § 10-101 [1961] Ark. Acts, p. 421.

retaining contract" did not retain title for all purposes. If, for instance, before it was paid for, the car was destroyed, it was the buyer's car which was destroyed, not the seller's.⁶⁰ On the other hand, if the buyer "sold" the car to a bona fide purchaser, the purchaser did not get title because it was not the buyer's car—the seller had title.⁶¹ In Arkansas, the certificate of title law⁶² defines "owner" as "[a] person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale . . . thereof . . . and with an immediate right of possession vested in the conditional vendee . . . then such conditional vendee . . . shall be deemed the owner for the purpose of this Act." This is the buyer, of course.

If the Arkansas court had used its certificate of title law, as Ohio did, to decide the question of priority, it could be argued that it should be sufficient to stop at this point without further examining the status of "title" in Arkansas. For U.C.C. section 9-202 provides:⁶³

Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

If the problem of priority is to be determined by the title law, then, priority there depends on who has "title", one can argue that the Code apparently intended to leave the rule as it was before the Code. The court decided the case on the lien statute alone, however, and the question arises whether or not a lender can "retain title" for security purposes under the Code anymore. The Comment to section 9-101 in part is as follows:⁶⁴

Under this Article the traditional distinctions among security devices, based largely on form are not retained; the Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of descriptive terms which has grown up at common law and under a hundred-year accretion of statutes. . . .

In short the lender does not "retain title" anymore; he "acquires a security interest." Furthermore section 9-202, above, seems to provide

60. *O'Neil-Adams Co. v. Eklund*, 89 Conn. 232, 93 A. 524 (1915).

61. *Howell v. Thew Shovel Co.*, 184 Ark. 777, 43 S.W.2d 366 (1931).

62. ARK. STAT. ANN. § 75-111 (Repl. 1957).

63. ARK. STAT. ANN. § 85-9-202 (Add. 1961).

64. ARK. STAT. ANN. § 85-9-101 (Add. 1961). The compilation includes the Comments to the sections of the U.C.C.

that the garageman's "right" (to priority over the lender) given by section 9-310 is to prevail even though priority under the earlier (lien) statute turned on whether or not the lender "retained title." If this interpretation of section 9-202 is incorrect, then for the purpose of deciding this case either sections 9-202 and 9-310 (taken with the Arkansas lien statute) are irreconcilable, or 9-202 is to be ignored in solving the problem. If the first (irreconcilability) is true, then since the lien statute came first, it would seem that the later statute, the U.C.C., particularly section 9-202, would govern and the garageman would win. The second possibility (that is, ignoring section 9-202) would be accomplished on a very strict construction of that section. One would have to argue that the garageman's priority does not depend upon section 9-310 but upon 9-310 plus the lien statute. Thus, since the "right" is given by the Article plus another statute, the "right" is limited by any limitation found in either the lien statute or 9-310. Under the lien statute, the garageman's "right" (given in 9-310) is limited when "title" is "retained" by the lender; and to the extent that section 9-202 would provide that title retention is immaterial, it is to be ignored. Title retention is *very* material.

The best justification for the court's decision rests on trying to decide what the legislature would say—today—is the meaning of words used about fifty years ago. At that time in Arkansas, sellers did "retain title" and could assign it to others. They could do this and prevail over other creditors even without filing any notice that they were doing so.⁶⁵ Today, subject to certain conditions, they can, in effect, do the same thing although different words are used to describe what they do: today they acquire a "purchase money security interest in consumer goods."⁶⁶ And under section 9-302(d) they need not file to perfect the interest.⁶⁷ However, under section 9-307 they will find themselves

65. *Howell v. Thew Shovel Co.*, 184 Ark. 777, 43 S.W.2d 366 (1931).

66. "Consumer goods" are defined in ARK. STAT. ANN. § 85-9-109(1) (Add. 1961):

Goods are

(1) "consumer goods" if they are bought for use primarily for personal, family or household purposes.

"Purchase money security interest" in the sense used here is defined in ARK. STAT. ANN. § 85-9-107(a) (Add. 1961):

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price;

67. ARK. STAT. ANN. § 85-9-302 (Add. 1961) provides:

without security if their Arkansas buyer sells to another consumer under the right conditions.⁶⁸ Furthermore, one is out of luck trying to use section 9-302(d) to justify the holding in the *Bond* case, for that very subsection requires filing for a "motor vehicle".⁶⁹ And that was the chattel involved. Nevertheless Comment 2 to section 9-310 contains the following words:

Some of the statutes creating such [artisans'] liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions.

By deciding that a "lien . . . retaining title" in an automobile is the same as a "security interest"—perhaps even a purchase money security interest—the court concluded that the lender prevailed. It was of no consequence that in the old days the "title" was "retained" without filing, whereas today the "security interest" is not "perfected" unless noted on the certificate of title.⁷⁰ It is submitted that the result of the *Bond* case will be repeated only when an automobile was financed as the one there was. "The form *does* count."⁷¹

Later in 1968, Virginia was presented with the problem. Its statute is unique among those examined here. It did not put the parties into an all or nothing-at-all situation. The seller used a conditional sale contract in the sale of the vehicle. Under the agreement the seller "reserved title" pending payment of the purchase price in full. The seller assigned the contract to a bank. (The seller was the plaintiff here, because after the trouble arose the bank reassigned the contract to it.)

(1) A financing statement must be filed to perfect all security interests except the following:

* * *

(d) A purchase money security interest in consumer goods; but filing is required . . . for a motor vehicle required to be licensed.

68. ARK. STATM ANN. § 85-9-307(2) (Add. 1961) provides:

* * *

(2) In the case of consumer goods . . . , a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statement covering such goods.

69. See the last clause of the subsection in note 67, *supra*.

70. This statement applies only to the facts of the *Bond* case. There will no doubt be cases later when lack of filing will be of consequence. Furthermore unlike the narrow application of the U.C.C., "title" could be "retained" and filing dispensed with when goods other than consumer goods were sold under a conditional sale contract.

71. P. Coogan, W. Hogan, and D. Vagts, 1 SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 93 (1967).

The garageman repaired the car after it had been wrecked. Because the purchaser defaulted in paying both parties, *Checkered Flag Motor Car Co. v. Grulke*⁷² arose. The court here used both the lien law⁷³ and the title law⁷⁴ in reaching its decision. As to the repairs, the certificate of title law was keyed into the lien law. Both statutes provided that the mechanic had priority over the person with the previously perfected security interest to the extent of seventy-five dollars. The implication one gets from this is that the other party has priority for any amount (up to the amount of his lien) over seventy-five dollars. Although the most that could be said of his priority by "indirect but forceful means",⁷⁵ the court's holding means that this is as good as "expressly providing." The problem did not end there, however. The automobile had been stored before the repairman picked it up. He paid the storage charge and simply added it to his bill along with the charges for labor and materials. There was a statute⁷⁶ granting a lien for storage charges.

72 209 Va. 427, 164 S.E.2d 660 (1968).

73 VA CODE ANN. § 43-33 (Supp. 1966) provided:

Every mechanic, who shall alter or repair any article of personal property at the request of the owner of such property, shall have a lien thereon for his just and reasonable charges therefor and may retain possession of such property until such charges are paid.

And every mechanic, who shall make necessary alternations or repairs on any article of personal property which from its character requires the making of ordinary repairs thereto as a reasonable incident to its reasonable and customary use, at the request of any person legally in possession thereof under a reservation of title contract, chattel mortgage, deed of trust, or other instrument securing money, the person so in possession having authority to use such property, shall have a lien thereon for his just and reasonable charges therefor to the extent of seventy-five dollars, and may retain possession of such property until such charges are paid. In any action to enforce the lien hereby given all persons having an interest in the property sought to be subjected shall be made parties defendant. (emphasis added)

It has since been amended in a minor way.

74. VA CODE ANN. § 46.1-73 (Repl. 1967) provides:

The security interests, except security interests in motor vehicles, trailers and semitrailers which are inventory held for sale and are perfected under §§ 8.9-301 to 8.9-407, shown upon such certificates of title issued by the Division pursuant to applications for same shall have priority over any other liens or security interests against such motor vehicle, trailer or semitrailer, however created and recorded, except that lien of mechanics for repairs to the extent of seventy-five dollars given by § 43-33 if the requirements therefor exist, provided the mechanic furnishes the holder of any such recorded lien who may request it with an itemized sworn statement of the work done and materials supplied for which the said lien is claimed. (emphasis added)

75 The words are a quote from the Virginia Comment to its equivalent of U.C.C. § 9-310. The comment, incidentally, suggested that because of § 43-32 (see note 76 *infra*) the effect of the U.C.C. was to give the mechanic a lien without priority. The court expressed its disagreement with this conclusion.

76 VA CODE ANN. § 43-32 (Supp. 1968) provides:

Every keeper of a livery stable, marina or garage, and every person pasturing or keeping

It did not limit the lienor's priority to a specific amount. So the repairman argued his lien should have a priority without the seventy-five dollar limit. He was unsuccessful. The court limited the recovery of the garageman to seventy-five dollars in all.

Unlike the Ohio court, the Virginia court gave a bit of statutory history to explain its decision. The title law was amended the same year that the Uniform Commercial Code became effective in Virginia.⁷⁷ The statute providing for the lien for repairs was also amended.⁷⁸ The court pointed out that the title law was changed so that its language conformed to the Uniform Commercial Code. Both it and the lien law increased the amount allowed the garageman from fifty to seventy-five dollars. The court concluded that the basic principle of the priority of the lien on the certificate of title over other liens, except for the limited amount on the repair lien, was meant to be retained. For this reason it concluded that section 9-310 was not meant to change the order of priority of liens (statutory and consensual) that had existed previously.

The latest case, at the time this is being written, was decided in Florida in 1969, *Gables Lincoln-Mercury, Inc. v. First Bank & Trust Co.*⁷⁹ The type of instrument used was a "retain title contract". The seller had assigned it to the bank. The court found no problem of interpretation. The garageman's lien was statutory.⁸⁰ Although it could have been said that the lien statute impliedly "provided otherwise",⁸¹ it did not do so expressly. So the court found for the garageman.

HINTS ON RESULTS IN OTHER STATES

In the discussion above this writer used only state appellate cases which based their decisions upon the interpretation of the statutes

any horses or other animals, vehicles, boats, or harness, shall have a lien upon such horses and other animals, vehicles, boats, and harness, for the amount which may be due him for the keeping, supporting and care thereof, until such amount is paid.

77. VA. CODE ANN. § 46.1-73 (1967). The U.C.C. is now VA. CODE ANN. § 8.1-101 - § 8.10-104 (1965).

78. VA. CODE ANN. § 43-33 (Supp. 1968).

79. 219 So.2d 90 (Fla., 1969).

80. Again the reader must go to more than one section to find "the statute". FLA. STAT. ANN. § 713.50 (1969) provides:

Liens prior in dignity to all others accruing thereafter shall exist in favor of the following persons, upon the following described property, under the circumstances hereinafter mentioned in part II of this chapter, to wit: . . .

Beginning with § 713.51 the liens are listed. FLA. STAT. ANN. § 713.58 (1969) provides:

In favor of persons performing labor or services for any other person, upon the personal property of the latter upon which the labor or services is performed, or which is used in the business, occupation, or employment in which the labor or services is [sic] performed.

81. The lender claimed that § 713.50 (see note 80 *supra*) expressly "provided otherwise" because his consensual lien was prior in time to the garageman's lien.

mentioned at the beginning of this article. The cases below were omitted because they did not meet these qualifications. In two states they were not opinions of the highest or intermediate appellate courts of the states, but reflected interpretation at the trial level. In another state, the facts arose after the Uniform Commercial Code was passed but before it was effective in the state. Nevertheless, a federal court made a guess at what the state court would do with the problem if it were ever faced with it. And in a fourth state the decision was reversed because the machine was held not to be a motor vehicle, but the court in dicta indicated what it might do when faced with the problem of interpretation.

In New York, although as of the time this is written neither the Court of Appeals nor the Appellate Division of the Supreme Court has decided the point, in 1965 a trial court⁸² (the Civil Court of the City of New York) decided in favor of the repairman. This was affirmed unanimously in a per curiam opinion by the Appellate Term of the Supreme Court.⁸³ There was no involved interpretation problem facing the court, however. The lien law⁸⁴ granted the repairman priority even though the automobile was subject to a security interest, so long as he kept continuous possession. Although this seems like nothing more

82 *Schliemer v. Arrowhead Garage Inc.*, 46 Misc.2d 607, 260 N.Y.S.2d 271 (1965), *aff'd* 49 Misc. 2d 775, 267 N.Y.S.2d 995 (1966).

83 *Schliemer v. Arrowhead Garage Inc.*, 49 Misc. 2d 775, 267 N.Y.S.2d 995 (1966).

84 N.Y. LIEN LAW § 184 (McKinney 1966) provides:

A person keeping a garage, hangar or place for the storage, maintenance, keeping or repairing of motor vehicles or of motor cycles as defined by the vehicle and traffic law, or of motor boats as defined by article seven of the navigation law, or of aircraft as defined by article fourteen of the general business law, and who in connection therewith stores, maintains, keeps or repairs any motor vehicle, motor cycle, motor boat, or aircraft or furnishes gasoline or other supplies therefor at the request or with the consent of the owner, whether or not such motor vehicle, motor cycle, motor boat or aircraft is subject to a security interest, has a lien upon such motor vehicle, motor cycle, motor boat or aircraft for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle, motor cycle, motor boat, or aircraft or for furnishing gasoline or other supplies therefor and may detain such motor vehicle, motor cycle, motor boat or aircraft at any time it may be lawfully in his possession until such sum is paid, except that if the lienor, subsequent to thirty days from the accrual of such lien, allows the motor vehicle, motor cycle, motor boat or aircraft out of his actual possession the lien provided for in this section shall thereupon become void as against all security interests, whether or not perfected, in such motor vehicles, motor cycle, motor boat or aircraft and executed prior to the accrual of such lien, notwithstanding possession of such motor vehicle, motor cycle, motor boat or aircraft is thereafter acquired by such lienor.

than a codification of the common law possessory lien, a repairman in that state may satisfy his lien by a sale⁸⁵ of the property.

In 1966, a Pennsylvania trial court⁸⁶ found for the repairman. The next year another trial court⁸⁷ in that state reached the same result. The instrument used in both cases was referred to as an "installment sale contract". It had been recorded on the certificate of title. Neither case cited the lien statute⁸⁸ but one referred to a supreme court case⁸⁹ decided before the Uniform Commercial Code had been adopted by Pennsylvania and concluded that the Code had not changed the order of priority.

In 1966, a United States District Court,⁹⁰ deciding a case in Colorado after that state had adopted the Uniform Commercial Code, but involving facts that arose before it became effective, held that the garageman had priority. On appeal this was reversed.⁹¹ The Court of

85. N.Y. LIEN LAW § 200 (McKinney Supp. 1969) provides:

Sale of personal property to satisfy a lien. A lien against personal property, other than the lien of a warehouseman pursuant to section 7-209 of the uniform commercial code, the lien of a carrier pursuant to section 7-307 of the uniform commercial code, a security interest in goods and the lien of a keeper of a hotel, apartment hotel, inn, boarding-house or lodging-house, except an immigrant lodging-house, if in the legal possession of the lienor, may be satisfied by the sale of such property according to the provisions of this article.

86. *First National Bank of Bloomsburg v. Vargo Motor Co.*, 43 Pa. D & C 2d 698, 5 U.C.C. REP. 252 (Pa. Ct. Comm. Pl., Cambria County, 1966).

87. *Philadelphia National Bank v. K & G Speed Associates*, 43 Pa. D & C 2d 241, 4 U.C.C. REP. 970 (Pa. Ct. Comm. Pls., Delaware County, 1967).

88. PA. STAT. ANN. tit. 6, § 11 (1963) provides:

Hereafter where any person, corporation, firm, or copartnership may have what is known as a "common law lien" for work done or material furnished about the repair of any personal property belonging to another person, corporation, firm, or copartnership, it shall be lawful for such person, corporation, firm, or copartnership having said common law lien, while such property is in the hands of the said person, corporation, firm, or copartnership contributing such work and material, to give notice in writing to the owner of the amount of indebtedness for which said common law lien is claimed for the labor and material that has entered into the repair, alteration, improvement, or otherwise, done upon the said property. If the said claim for said work or material is not paid within thirty days the said person, corporation, firm, or copartnership to which said money is due, may proceed to sell the said property, as hereinafter provided: Provided, however, That the owner of said property, if he disputes said bill, may issue a writ of replevin, as provided by law, within the said thirty days, and the said dispute shall be settled in said action of replevin.

PA: STAT. ANN. tit. 12A, § 10-102 (1954) provides that it repeals this section insofar as its provisions are inconsistent with the U.C.C.

89. *Commonwealth v. Lombardo*, 356 Pa. 597, 52 A.2d 657 (1947).

90. *First Security Bank of Idaho v. Crouse*, 252 F. Supp. 230 (D.C. Colo., 1966), *rev'd* 374 F.2d 17 (10th Cir., 1967).

91. *First Security Bank of Idaho v. Crouse*, 374 F.2d 17 (10th Cir., 1967).

Appeals based its decision on the fact that the title law⁹² provided that notation of an encumbrance on the certificate was "notice to the world of each and every right of the person secured by" the encumbrance. Furthermore, it felt that its decision was supported by the fact that Colorado's version of section 9-310 provided that the repairman's lien "does not take priority over a perfected security interest unless a statute expressly provides otherwise."⁹³

Also in 1966, a New Jersey court decided against the repairman in *National State Bank of Newark v. Rapp*.⁹⁴ The case involved a bulldozer and on appeal was reversed.⁹⁵ The supreme court held that a bulldozer was not a "motor vehicle" and that therefore the repairman prevailed. On the same day, the supreme court decided *Ferrante Equipment Co. v. Foley Machinery Co.*⁹⁶ This case also held that a bulldozer was not a "motor vehicle" but in dicta indicated that if it were, the repairman would lose for the garageman would be a "garage keeper" under the Garage Keepers and Automobile Repairman's Act.⁹⁷ The lien given to a garage keeper (repairman) is statutory, and the statute expressly provides:⁹⁸

The lien shall not be superior to, nor affect a lien, title or interest of a person held by virtue of a prior conditional sale or a prior chattel mortgage properly recorded or a prior security interest perfected in accordance with chapter 9 of Title 12A of the New Jersey Statutes.

Title 12A, Chapter 9 is New Jersey's version of U.C.C. Article 9. So the reference was obviously to section 9-310. The problem of

92 COLO REV STAT. ANN. § 13-6-19(1) (Cum. Supp. 1967) provides:

Except as provided in this section the provisions of the "Uniform Commercial Code", chapter 155, Colorado Revised Statutes 1963, relating to the filing, recording, releasing, renewal, and extension of chattel mortgages, as the term is defined in section 13-6-2(14), shall not be applicable to motor vehicles. Any mortgage intended by the parties thereto to encumber or create a lien on a motor vehicle, to be effective as a valid lien against the rights of third persons, purchasers for value without notice, mortgagees or creditors of the owner shall be filed for public record and the fact thereof noted on the owner's certificate of title or bill of sale, substantially in the manner provided in section 13-6-20; and the filing of such mortgage with the authorized agent and the notation by him of that fact on the certificate of title or bill of sale, substantially in the manner provided in section 13-6-20, shall constitute notice to the world of each and every right of the person secured by such mortgage.

93 See note 5 *supra*.

94 90 N J. Super. 300, 217 A.2d 325 (1966).

95. 49 N J. 457, 231 A.2d 223 (1967).

96. 49 N J. 432, 231 A.2d 208 (1967).

97 N J REV. STAT. § 2A:44-20 *et seq.* (1952).

98 N J REV. STAT. § 2A:44-21 (Supp. 1969).

interpretation was an easy one for the court since the statute did expressly "provide otherwise." But there has not yet been a holding on this point.

CONCLUSION

One conclusion that can be reached from going over the cases examined in this article is that the garageman has in some states been benefitted by the adoption of the Uniform Commercial Code. However, in none of the cases is there an instance of the lender's being benefitted by its adoption. Consider, in alphabetical order the states where the repairman lost after the adoption of the Code. In Alaska, it is true that he won in a case prior to the Code.⁹⁹ However, the law was changed after that decision and before the Code and he probably would have lost had a case come up. At least it was not the Code which subordinated his claim. In Arkansas, he lost before the Code.¹⁰⁰ Although it is speculation to say how he will fare in Colorado,¹⁰¹ at least on the surface the Code does not help him. In Illinois, where he enjoyed a brief moment of victory, and where his fate is uncertain now, he lost before the Code.¹⁰² In New Jersey, where the dicta may some day prove to be the holding, he lost before the Code.¹⁰³ He also lost in Ohio,¹⁰⁴ although an earlier case¹⁰⁵ had held that he could win if it could be found that the lender impliedly consented to have the repairs made. As for Virginia, this writer could find no case on the point.

The repairman seems to have held his ground in New York¹⁰⁶ and Pennsylvania,¹⁰⁷ at least if the trial court cases are indicative of the interpretations that the higher courts will follow.

In four states, the repairman benefitted by the passage of the Code. They are Florida,¹⁰⁸ Kentucky,¹⁰⁹ Oklahoma,¹¹⁰ and Tennessee.¹¹¹

99. *Blackard v. City Nat'l Bank*, 16 Alaska 344, 142 F. Supp. 753 (D.C. Alaska, 1956).

100. *Goff-McNair Motor Co. v. Phillips Motor Co.*, 226 Ark. 751, 294 S.W.2d 342 (1956).

101. He lost in *Walker v. Mathis*, 78 Colo. 384, 242 P. 68 (1925).

102. *General Motors Acceptance Corp. v. Allen*, 52 Ill. App.2d 114, 201 N.E.2d 747 (1964).

103. *B.C.S. Corp. v. Frick*, 19 N.J. Misc. 129, 18 A.2d 560 (1941).

104. *Metropolitan Sec. Co. v. Orlow*, 107 Ohio St. 583, 140 N.E. 306 (1923).

105. *Ohio Finance v. Middleton*, 14 Ohio App. 43 (2d Dist. Ct. App., 1921).

106. *Motor Discount Corp. v. Scappy & Peck Auto Body Inc.*, 12 N.Y.S.2d 227, 188 N.E.2d 907 (1963).

107. *Commonwealth v. Lombardo*, 356 Pa. 597, 52 A.2d 657 (1947).

108. *Richardson Tractor Co. v. Square Deal Mach. & Sup. Co.*, 149 Storage Co., Inc., 151 So.2d App., 1963; *Dade Nat'l Bank of Miami v. University Transfer & Storage Co., Inc.* 151 So.2d 868 (Fla. Dist. Ct. App., 1963).

109. *Lincoln Bank & Trust Co. v. Netter*, 253 S.W.2d 260 (Ky., 1952).

110. *United Tire & Inv. Co. v. Maxwell*, 202 Okla. 476, 215 P.2d 541 (1950).

111. *City Fin. Co. v. Perry*, 195 Tenn. 81, 257 S.W.2d 1 (1953).

What sort of precedents can be found in these cases for future court decisions? To this writer at least, although the material covers only about five years in time and one-fourth of the jurisdictions that have adopted the Uniform Commercial Code, there is precedent for almost anything. If there is a statute which grants the repairman a lien and which expressly subordinates him, there appears (so far) nothing the courts can do but give the person with the previously perfected security interest priority in the matter. Also, because of the wording of section 9-310 in Colorado, the court there may decide it has no choice but to subordinate the repairman. But one thing is certain, and that is that the repairman cannot rest easy merely because the statute granting him the lien does not subordinate him in order of priority.

To start through section 9-310 in the order in which it is written, one result that might be found in the Virginia case is that the lien being claimed must result from services or materials rendered by the one claiming the lien. From now on perhaps the repairman picking up a car to repair it should advise the one who stored it to collect directly from the owner. If the repairman pays the bill and adds it to his own, he may never be repaid for that expense.

Next, if a court wants to subordinate a common law lien of the repairman, it can cite the Ohio cases and go no further. On the other hand if it wishes to give the common law lien priority, it can cite the Tennessee case. It can go even further and by showing the background of the Ohio statutes, it can distinguish the Ohio cases. On the other hand if the legislative background of its statutes is similar to Ohio, it can, as in the case of Virginia, go into detail to explain why it is subordinating a garageman asserting the common law lien. This is on the assumption that it thinks the lender should have priority. If it thinks otherwise, it can cite the Tennessee case, say that this follows section 9-310 literally, and blame the legislature for not stating its intent more clearly.

This brings up the matter of the extent to which the court should bend over in trying to find and enforce the legislative intent. The Ohio and Virginia courts seemed to interpret the statutes as if they were instruments—assuming that even though they did not discuss it the two Ohio courts considered the legislative history of the sections involved. They looked to the surrounding circumstances at the time the legislature was in session and, even though they did not find a clear indication of what the legislature meant, they based their decisions on what they thought the legislature meant to provide. The Florida court,

on the other hand, could have found the legislative meaning from what the statutes implied. But it interpreted literally the words "expressly provides".

To go further into the section, it is obvious that "the statute" need not mean "the lien statute". But it can. In Ohio, Alaska, and Virginia, the courts went to the certificate of title laws to defeat the repairman. In Kentucky and Illinois, the courts did not restrict themselves to a discussion of the lien statutes relied upon, although they did find for the repairman. On the other hand, Oklahoma allowed the repairman to have priority because the statute he relied upon gave it to him, even though another statute denied it to him.

The Florida court gave the repairman priority because the statute did not "expressly provide otherwise." In Virginia, however, he lost because although the statutes did not provide so "expressly", the court decided that by "indirect but forceful means" they provided that he should lose.

As for the type of instruments to be used, this made the difference in Arkansas, Illinois, and Kentucky. But each case here seems to represent a different point of view. As for the names of the instruments, perhaps the Illinois viewpoint has more in its favor than that of Kentucky, but not much. Before the Uniform Commercial Code there was a difference between the legal effect of a conditional sale contract and a chattel mortgage. And in trying to decide the intent of legislators *at an earlier time*, one might argue that they intended to give a better priority position vis-a-vis the repairman to one than the other. And one might argue that the Arkansas court should try to decide what the legislators would say today if they were asked to define words now a bit out of date. Still, today, an instrument, whether it has "Chattel Mortgage", "Conditional Sale Contract" or "Title Retaining Agreement" printed at the top, is legally looked upon as a "Security Agreement", where its provisions do not bring into play certain sections of the Uniform Commercial Code, the type of instrument (or name given it) will not affect its enforcement.

In summary, except where either the lien statute or section 9-310 limits the court in its interpretation, there are already precedents for courts needing them to find either for the repairman or for the lender. Which precedents the judges choose may tell more about the attitude of the members of the court than the attitude of the legislature that passed the statutes. But the reader should not be too quick to reach a conclusion. It may be that a judge is in sympathy with the policies that

favor the repairman; or he may be a “strict constructionist” who decides for the repairman even though he favors the lender. In either event all possible routes to these results have not appeared. And it should be interesting to the student of statutory construction or to the people interested in the struggle between the repairman and the lender to see what new reasons will be given by the courts for reaching their conclusions. One thing is certain. Not only are the states diverse in their versions of the Uniform Commercial Code, but the courts in the their interpretations are adding to the diversity.

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